IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

PAUL WEISS,

Petitioner,

- against -

Reverend MICHAEL WALSH, S.J., in his capacity as President of Fordham University; PAUL J. REISS, in his capacity as Vice-President of Academic Affairs of Fordham University; ROBERT ROTH, S.J., in his capacity as Chairman of the Department of Philosophy of Fordham University; EWALD B. NYQUIST, in his capacity as Commissioner of Education of the State of New York; JOSEPH W. McGOVERN, EVERETT J. PENNY, KENNETH B. CLARK, CARL H. PFORZHEIMER, JR., CHARLES W. MILLARD, JR., JOSEPH C. INDELICATO, EDWARD M. WARBURG, MRS. HELEN B. POWER, JOSEPH T. KING, ALEXANDER J. ALLEN, JR., FRANCIS W. McGINLEY, MAX J. RUBIN, THEODORE M. BLACK, STEPHEN K. BAILEY and HAROLD E. NEWCOMB, in their capacities as Regents of the University of the State of New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner, Paul Weiss,

respectfully prays that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 29, 1972.

OPINION BELOW

There was no opinion of the Court of Appeals, but an affirmance from the Bench. The relevant opinions of the District Court for the Southern District of New York are reported in the Appendix and one was reported in 324 F. Supp. 75 (S.D.N.Y. 1971).

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 29, 1972, and the Petition for Rehearing en banc was denied on August 29, 1972. This petition for certiorari was issued within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Was the Second Circuit Court of Appeals correct in affirming a dismissal of a Civil Rights action upholding as constitutionally sanctified the practice of exclusion from employment on the sole basis of chronological age?

(2) Was the Second Circuit Court of Appeals correct in finding no denial of due process in a trial where a jury was was denied, prejudice towards client and counsel shown and expert testimony excluded?

(1) Has the Second Circuit Court of Appeals overseen in affirming a dismissal of a Civil Rights action upholding as constitutionally permitted the practice of [illegible] on the sole basis of [illegible]

(2) Has the Second Circuit Court of Appeals [illegible] in finding no denial of due process in a trial where a jury was denied, permitting [illegible] and coerced [illegible] testimony [illegible]

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STATEMENT OF THE CASE

Paul Weiss, Sterling Professor of Philosophy at Yale University achieved 58 years of age on May 19, 1969. As previously agreed with Yale, he retired in June, 1969.

His resulting availability was widely known in philosophical circles. Many universities tried to interest him in teaching at their universities after June, 1968. In particular, Fordham University enlisted its academic Vice-President, other administrative officials, and various members of the Philosophy Department of Fordham to recruit Paul Weiss to come there.

On January 30, 1968, Robert Neville, Vice-Chairman of the Philosophy Department, wrote to Paul Weiss "to offer you the first of Fordham's University Professorships, to be effective in September of 1969" (A113-15).[1/] On February 6, 1968, Vice-President Arthur Brown wrote to

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1/ (A) refer to appendix to this Petition. Many facts, however, will not have (A) numbers but are taken from the total record below.

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clarify that "[the] beginning contract [was] for two years with the option of annual renewal as long as you and I wish to continue our association.

The parties (with Fordham enlisting various academics) continued to negotiate the contract and then on April 23, 1968, Arthur Brown wrote Paul Weiss that because of budgetary problems "[W]e must withdraw the offer of a university professorship and any other offer that would come out of our budget."

"Dr. Neville says he told you of our plan to offer you the Schweitzer Chair if Fordham can regain it. This plan is in no way changed. If the State does reallot a Schweitzer Professorship to us, you are our choice...If the Schweitzer Chair does come through, we shall be at your door again". (A 54).

In an explanatory letter of the same date, Robert Neville, drafter of the Arthur Brown letter, wrote "If the Schweitzer money still comes through, you will get it" (A 56). Following Arthur Brown's direction, Robert Neville discussed the letters and the general negotiations with Paul Weiss by telephone.

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The parties agreed they were waiting for the Schweitzer money together and that Paul Weiss would assume the Chair if and when the money became available from New York State.

While awaiting the Chair, Paul Weiss accepted another offer of a Heffer Chair of Philosophy at Catholic University where he now is with an understanding that he would leave to go to Fordham when the Schweitzer Chair funds became available. In the following months, Paul Weiss repeatedly asked when the money would become available and held up some plans waiting for the money. At parties with Fordham faculty he greeted them and they he as colleagues.

In the meantime, Fordham had a change of administrative personnel. Paul J. Reiss replaced Arthur Brown as Academic Vice-President, and Michael Walsh replaced Leo McLaughlin as President. Then, in the spring of 1970, it became common knowledge in the profession that the money for the Schweitzer Chair would be released to Fordham. On August 13, 1970,

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Paul J. Reiss after speaking to Alvin P. Learheimer of the State Education Department about Paul Weiss wrote him "[M]y predecessor in this office has informed a distinguished professor of Philosophy that he would be nominated by Fordham University for the Schweitzer Chair if and when Fordham was in a position to make such a nomination. This commitment was made over two years ago" (A 58) and inquired whether "the man's age...would not be...acceptable" (A 58). The State replied on August 25th that the matter should 'be governed by the Universities' own personnel policies."

On September 3rd, 1970, Paul Reiss wrote Paul Weiss

> "I have inquired of the State Education Department concerning a nomination for you. I have been informed by them, however, that such a nomination would not be approved since you would be in 1971 already beyond the age at which even a part-time position at the University could be maintained. The Schweitzer Professor is expected to be appointed in accordance with the University's normal faculty policies. In addition, the State Education Department pointed out that the purposes that motivated the

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establishment of the Schweitzer Chair assume that an appointee will hold the Chair for an extended period of years.

I regret that we are, therefore, unable to nominate you for the Chair. If Fordham had received the Chair, as it should have, several years ago, we would have had the benefit of your contributions to the University, its students and faculty. I am sorry that this did not come about."(A 60-61)

Paul Weiss then called Paul Reiss who informed him he was the only candidate and age the only factor of exclusion. Subsequent to the conversation, Paul Reiss again wrote Paul Weiss on September 22, 1970:

That the Schweitzer Professorship has been awarded to Fordham means that the University has been invited to submit a nominee. If, however, the State Education Department is not favorably inclined toward approving a nominee who would be 68 years of age they could select a nominee from another institution. We know, as I indicated to you, that they would not be favorably inclined to approve your appointment. Fordham could then lose the Chair altogether, not because our nominee was rejected but because the State preferred the nominee of another institution.

For these reasons, the University is not desirous of pushing the issue but prefers to work with the State nominating someone whose approval would not present difficulties for the State.

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> I am not sure whether legally this constitutes discrimination on the basis of age. In some sense I suppose that all mandatory retirement policies are discriminatory, including Fordham's. At the present, however, it is the context within which we must operate.
>
> I regret, therefore, that on the basis of its perception of the present situation Fordham does not feel as though it should nominate you for the Schweitzer Professorship, as it would definitely have done several years ago.
>
> Again, my best wishes for continued success in your work which will clearly continue well past the age of 70
> (A 62-63)

In October, 1970, a suit was filed under the Civil Rights Act and diversity jurisdiction, claiming a number of causes of action; in particular, the unconstitutionality of exclusion on the basis of age and a breach of contractual relationship between Fordham University and Paul Weiss. On February 5, 1971, the Honorable Harold Tyler dismissed the constitutional claims from the bench and denied a Preliminary Injunction in a decision later reported in writing at 234 F. Supp. 75 (1971). Judge Tyler held "[B]eing a classification that cuts fully across racial, religious, and economic lines...age is less likely to be an invidious distinction...

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Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still the future. It cannot be said, therefore, that age ceilings upon eligibility for employment are inherently suspect, although their application will inevitably fall unjustly in the individual case" (A 5). Denial of the injunction was appealed to the Second Circuit Court of Appeals and denied on October 29, 1971, in an unreported decision. Subsequently, the appellees moved for Summary Judgment on November 26, 1971, after completion of depositions, and such a motion was denied on January 7, 1972 by written opinion. The Court denied a demand for a jury trial at that time. In Fordham's answer, as is common in discrimination suits, the answer interposed was that rejection was not based on discrimination but on preference of another. At trial, however, no such person could be found. Paul Reiss said it was Richard Wade, yet members of the

Philosophy Department insisted it was John Smith or perhaps Welfred Sellars.

At the conclusion of the trial, the Honorable Harold Tyler ruled in favor of Fordham and State.

The appeal was heard and affirmed from the bench on June 29, 1972. A timely petition for a rehearing en banc was filed and denied on August 29, 1972.

POINTS OF ARGUMENT

I.

AGE DISCRIMINATION IS UNCONSTITUTIONAL, IN GENERAL, AND IN PARTICULAR WHEN APPLIED TO INDIVIDUALS WITHOUT ANY FINDING OF INDIVIDUAL DISQUALIFICATION.

II.

WHEN A TRIAL COURT CLEARLY DEMONSTRATES PREJUDICE AND PREJUDGMENT BY EXCLUDING EXPERT TESTIMONY, EXHIBITING HOSTILITY TO CLIENT, CASE, AND COUNSEL, ETC. AND THEN DENYING A JURY TRIAL ON FACTUAL ISSUES, THE JUDGMENT SHOULD BE REVERSED.

EXCLUSION FROM EMPLOYMENT ON THE BASIS OF AGE IS UNCONSTITUTIONAL, IN GENERAL; AND IN PARTICULAR HERE, AS APPLIED TO PETITIONER WITHOUT ANY FINDING OF INDIVIDUAL DISQUALIFICATION.

"To be 70 years young is sometimes more cheerful and hopeful than to be 40 years old."

OLIVER WENDELL HOLMES

A. This Case Presents Age Discrimination Squarely to this Court.

Judge Harold Tyler, of the Southern District, ruled that any discrimination on the basis of age was constitutionally correct and issued an opinion accordingly dismissing a number of the causes of action based on age discrimination. This decision was affirmed by the Second Circuit. At trial it became clear that age was a major, if not totally determinative factor, in decisions to renege on promises and exclude petitioner Paul Weiss from even consideration in connection with

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the Schweitzer Chair (A 41). Defendants' three professional witnesses testified that at departmental meetings, petitioner's age was given as the reason for rejection. In particular, Paul Reiss, Academic Vice-President, stated not only would Fordham's retirement policy preclude giving the Schweitzer Chair to petitioner but also he thought petitioner's age might cause the State Board of Education to reject petitioner and Fordham if petitioner's name was put forward as the Schweitzer Chair nominee (A 85-91-94). In correspondence in which he referred to a "commitment" to Paul Weiss, he inquired as to whether age would preclude him (A 55).

This case, therefore, directly presents for the first time to the Supreme Court the question of whether an individual can, consistent with equal protection, be singled out for rejection

soley on the basis of his chronological age. It is petitioner's position that such a general classification to discriminate against people past a certain age is irrational past the point of clear unconstitutionality and that the use of Paul Weiss' age for discrimination against academic employment, is unconstitutionally arbitrary. In particular, the vice of the discrimination is particularly pernicious here where a generalization, arguable at best, is applied without proof of relevancy or reason for applicability to an individual. Such an important issue of discrimination should be dealt with by certiorari for the issue is not only constitutionally crucial but also a common occurrence. See, e.g., practices dealt with in Note, 44 S. Cal. L. Rev. 150 (1971); Nevil Trochin-James, Arbitrary Retirement,

(1967), especially Chapters 7 and 8. It should also be noted that one-third of the pension plans in the United States exclude from benefits those who retire past a certain age. U.S. Dept. of Labor, Pension Plans Under Collective Bargaining, Pt. II, Involuntary Retirement Provisions, BLS Bull. 1259 (1959), Table 17, p. 24.

B. The Justification of Age Discrimination Advanced in this Case Cannot Withstand Critical Scrutiny.

This case presents a classification of exclusion for potential holders of the New York State Schweitzer Chair who are past a certain chronological age. Two classes of people are thereby created. The first is free for offers for the Chair with no mention of age, future productivity, health, etc. The other, of which petitioner is a

perfect example, is classified for exclusion solely on the basis of chronological age--an irrational, baseless exclusion in the intellectual realm. Hoyt v. Florida, 368 U.S. 57 (1961), held that "the Fourteenth Amendment reaches...all...exclusions which 'single out any class of persons for different treatment not based on some reasonable classification'; Hernandez v. Texas, 347 U.S. 475, 478." As this Court stated explicitly in Harper v. Virginia Board of Elections, 383 U.S. 663, 669 (1966),

> "...the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed

> catalogue of what was at a given time deemed to be the limits of fundamental rights. See Malloy v. Hogan, 378 U.S. 1, 5-6. Notions of what constitutes equal treatment for purposes of the Equal Protection do change."

In the case at bar, the District Court Judge, affirmed by the Second Circuit, reached two separate conclusions regard the petitioner's argument that discrimination based upon age is unconstitutional. The first holding was that such discrimination is not prohibited by the Constitution (A 5). See, on the other hand, this Court in Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 155 (1897), "[The State] may not say that all men beyond a certain age shall be alone thus subjected."

The second conclusion which led to dismissal of the Civil Rights cause of action based on age discrimination

was that discrimination based upon age simply is not invidious:

> "Notwithstanding great advances in gerontology, the era when advanced age ceases to bear some reasonable statistical relationship to diminished capacity or longevity is still future." (A 5).

This finding had no general or particular foundation in the record made at trial, nor did it have any particular reference to the actual litigation involved, but still served as the basis of dismissal of the causes of action. To bolster this find and Constitutional claim, Judge Harold Tyler argued in support of age discrimination and dismissed all of the actions against it by stating that age is "a classification that cuts fully across racial, religious, and economic lines" (A 4).

Of course, the same is true for race, religion, and wealth, each of which cuts across the other classifications. People of different races have different religions and ages. These unreasoned and unsupported statements justifying age discrimination constitute the opinion that petitioner hopes this Court will examine in the correct constitutional perspective.

C. Classifications Which Exclude Particular Minorities are Unconstitutional.

In general, when actions are made directly against a specific minority, they violate the constitutional mandate.[2/]

2/ For example, many categories besides race are included under the equal protection of the Fourteenth Amendment. See on travel, U.S. v. Guest, 383 U.S. 745 (1965) and Shapiro v. Thompson, 394 U.S. 618 (1969); the legitimacy of birth, Levy v. Louisiana, 391 U.S. 68 (1968); poverty, Griffin v. Illinois, 351 U.S. 12 (1956); Harper v. Virginia Board of Elections, supra, and right to custody of child, May v. Anderson, 345 U.S. 528 (1953), Stanley v. Illinois, 92 S. Ct. 1208 (1972). See also, Central Presbytery v. Black Liberation, 303 F. Supp. 894 (E.D. Mo. 1969).

Yick Wo. v. Hopkins, 118 U.S. 356 (1886). See also Ex Parte Virginia, 100 U.S.339 (1880); Concordia Fire Insurance Co. v. Illinois, 292 U.S. 535 (1935). See opinion of Douglas, J. in Furman v. Georgia, 32 L. Ed. 2d 35 (1972). Selective enforcement based on an improper standard such as race, religion or other arbitrary classification, Oyler v. Boles, 368 U.S. 448, 456 (1962), violates the equal protection clause. See also Carrington v. Rash, 380 U.S. 89 (1965) and citations therein.

D. The Aged as a Minority Group are Entitled to the Full Scope of the Equal Protection Clause.

Discrimination based on age, unless justified by some rational reason, must automatically be struck down under the Fourteenth Amendment guarantees. The aged

have always been recognized as a minority group in the administration of public benefit programs and in other areas. See, e.g., Social Security Laws, 42 U.S.C. 402 et seq. See also, Milton Barron, The Aged American, 1961 , Ch. 3, "The Aged as a Quasi Minority Group," p. 65. See, e.g., Economics of Aging: Toward a Full Share in Abundance, by Special Senate Committee on Aging (12/31/70).

The reason for such exclusionary behavior given by the Court below was the claim that advanced age usually results in the decline of professional ability. Thus far, no one in this case has asserted reasons to believe this and no findings of fact either in general or as applied for professional candidates to the Schweitzer Chair were made. The assumption for dismissal was that the aged are always infirm—

even here in the world of creative academics. In fact, scientific studies indicate the opposite of such assumptions of intellectual failure associated with years. See, for example, "Age, Intelligence and Learning" by Russell F. Green in Industrial Gerontology, No. 12, Winter 1972, pp. 29-40; see also Nevil Tronchin-James, Arbitrary Retirement, 1962 particularly Chapters 7 and 8.[3/] What these and other studies show is that there is no set pattern of decline in intellectual productivity and indeed many people have increased productivity in their 70's, 80's and 90's.

3/ A twelve-page representative list of accomplishments of people beyond the chronological year of 69, accumulated in the Addendum was annexed to the brief in the Second Circuit and would be submitted in augmented form to this Court if certiorari were granted.

Evidence to the contrary is not available and was not used as a basis of dismissal. Yet such evidence must be demanded in cases of age discrimination not only because any classification which excludes individuals on a characteristic must be justified, but also because the scientific evidence in the intellectual domain involved here is, in fact, to the contrary.

E. The Particular Age Chosen to Exclude is Arbitrary.

The use of 65 as a retirement age in this country originates directly from Otto von Bismarck's old-age legislation. His was the first such law in any of the Western countries and one which served as a model for many old-age insurance laws in other countries in addition to the United States. At the time his law took effect, the average life expectancy

in Germany was 35. It is now twice that in the United States. See 113 Cong. Rec. 31256, 1967, Comments of Senator Young at 31256. Even if one were to argue that there was a decline in productivity with advanced chronological age, and that general principle had been established in this case, a reason would still have to be given for why the age of 65 or any other age, now so arbitrarily given, is the appropriate age to so classify, exclude and punish. Not only is there no evidence, as petitioner argues, nor can there be for the claim that advanced age necessarily means loss of intellectual productivity, but also there is no evidence as to why this particular age is the one moment for the intellectual grim reaper. There must be reason not only to exclude for advanced years but

reason for the number used to close the gates to the groves of academe for those found with the unwanted accumulation of years.

F. Applying the Irrebuttable Presumption of Aged Infirmity Without Particular Proof Violates Equal Protection.

Even if one were to assume that age were a relevant factor and that, in particular, the age of 65 or 68 or 70 were the relevant age for age discrimination, what has occurred in the present case would still be unconstitutional. It has been held in many lower courts that in spite of general presumptions of general physical characteristics, no matter how reasonable, or statistical probabilities, no matter how weighty, individuals may, nonetheless, not be excluded particularly from employment, unless it has been shown that that

general characteristic applies to that individual excluded on that generalized reason. See e.g., Weeks v. So. Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

Petitioner has the Constitutional right to be free from generalizations made about members of his class. In this connection, the case of Bowe v. Colgate Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) is instructive. In that case, the company refused to let women have jobs which required lifting weights of more than 35 pounds because of claims of biological inadequacy. The Court in that case struck down this work provision to hold that "all workers...[must] be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular

basis." See also Cheatwood v. So. Central Bell Tel. & Tel. Co., 303 F. Supp. 754 (M.D. Ala. 1969).[4/] See also Rosenfeld v. Southern Pacific Co., 293 F. Supp. 1219 (C.D. Cal. 1968); U.S. v. York, 281 F. Supp. 8 (D. Conn. 1968). These cases involved physical abilities--petitioner's involves intellectual abilities--an even easier case for the right to be free of generalizations to exclude. Can anyone maintain statistics dictate certainties in philosophy or generalizations about age, or can base remotely accurate predictions (for administrators, agencies, courts, etc., to make) about the quality of future philosophical productivity?

4/ The fact, for example, that few Puerto Ricans go to colleges does not justify blanket exclusion; and even in sports, if old football players throw less well, George Blanda is still a good quarterback and place kicker.

The Albert Schweitzer Chair would be non-existent if the same standard had been applied to the late Dr. Albert Schweitzer, many of whose major achievements came after he was older than petitioner. The absurdity of such blanket generalizations in the intellectual realm is made clear by the people we entrust our lives to: politicians, statesmen, judges, doctors, lawyers. All these thinking men face no age limitation. So, too, should professors of philosophy not face rejection based on chronological age alone. In no way in this case has there been an attempt to demonstrate that this particular class prejudice applies particularly to petitioner (or is a bona fide occupational qualification). At trial it was agreed, without question, that there was no dispute about petitioner's

future intellectual productivity as described by defendant Paul J. Reiss as certain to "continue well past the age of 70." In the dismissal of the complaint, Judge Harold Tyler commented the classification by age might "fall unjustly in the individual case" (A 5). Such particular unjust result did not appear to bother the Second Circuit either. Paul J. Reiss, Vice-President and defendant testified that he thought it was all right to exclude Paul Weiss on the basis of age for a job on the basis of something he had "no control over." So, too, one has no control over whether one is Black, female, Jewish or redheaded but does have the right to be free from prejudice or generalization about the group. Such particular unjust results, as here, are precisely what is forbidden

by the Constitution and the rights of individuals, Discrimination, philosophers, lawyers and Judges, no doubt agree, means at least in part applying judgments on irrelevant characteristics regardless of how well you generalize.

G. Denying Petitioner Employment Violates First, Fifth, and Fourteenth Amendments; and Any Such Classification Creating Such Denial is Suspect and Requires Strict Scrutiny.

It should be noted here what is sought in this case. The petitioner seeks the right to a Chair which has been promised him and whose enjoyment will enable him to accomplish many objectives, including the association where and with whom he would like. "The right to hold specific private employment and to follow... profession...comes within the liberty and 'property' concepts of the Fifth Amendment." Greene v. McElroy, 360 U.S. 474 (1959).

> "A man's job is his way of life. It is his bond with reality, his contact with the community, his form of participation in the business of purposeful existence. A man's job identifies him with society. It makes him a social and civilized person. He is securely attached to his job and through it to the life of society." Sondag, Forced Retirement in Prime of Life Called Absurd Waste, Employment Service Review of the U. S. Department of Labor, July-August, 1968.

See Pickering v. Board of Education, 391 U.S. 563 (1968).[5/]

By classifying to reject solely on the basis of age, the State inhibits the giving and receiving of information to the detriment of student, teacher and university community. Cf. Lamont v. Postmaster General, 381 U.S. 301 (1965).

This Court has shown itself extremely sensitive to classifications which infringe upon a basic civil right, such as association and dissemination of ideas.

5/ See in lower courts Board of Trustees v. Davis, 396 F.2d 730 (8th Cir. 1968); Rolfe v. County Board of Education, 391 F.2d 77 (6th Cir. 1968); Rainey v. Jackson State College, 435 F.2d 1031 (5th Cir. 1970); Birnbaum v. Trussel, 371 F.2d 672 (2nd Cir. 1966); Wald v. Stanley County Board of Education, 378 F.2d 275 (4th Cir. 1967); Johnson v. Branch, 364 F.2d 177 (4th Cir. 1966); Franklin v. County School Board, 360 F.2d 325 (4th Cir. 1966); Bomar v. Keyes, 162 F.2d 136 (2nd Cir. 1947).

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). Where a basic civil right is involved, even "rational purpose" (absent here) for differentiation is not an acceptable justification. Loving v. Virginia, 388 U.S. 1, 8, 12 (1967). Where a classification touches on a fundamental right, such as association for idea dissemination, "its constitutionality must be judged by the stricter standard of whether it promotes a compelling state interest." Shapiro v. Thompson, 394 U.S. 618, 639 (1969). As we have demonstrated, age discrimination cannot stand up even to a test of minimal rationality and certainly must fail in this constitutional context of intellectual employment.

H. Petitioner was Denied Due Process.

A discriminatory deprivation of

employment is a deprivation both of liberty and property without due process--a constitutional infringement. Greene v. McElroy, supra, at 492. The Court below stated that employment is a question for Constitutional rights only when speech and association are involved (A 4). Yet speech is involved here; and discrimination against a group is unconstitutional whether the group be mute or articulate. The property is petitioner's employment. The liberty is his freedom to practice his chosen profession, associate, learn, teach and disseminate information.[6/]

6/ See in lower courts, e.g., Olsen v. Regents of the University of Minnesota, 301 F. Supp. 1356 (D. Minn. 1966); McConnell v. Anderson, 316 F. Supp. 809 (D. Minn. 1970).

In short, petitioner's exclusion from the Schweitzer Chair is unconstitutional for the following related reasons:

1) The classification to exclude intellectuals from employment on the basis of an arbitrarily selected chronological age has no rational basis, and if it did, the reasonable basis of such classification must be demonstrated rather than presumed to justify dismissal of a civil rights suit.

2) In the field of employment and association, this discriminatory exclusion is particularly suspect because it infringes upon basic rights and, thereby, demands strict scrutiny.

3) Perhaps, most important, petitioner Professor of Philosophy Paul Weiss, has a right to be free from generalization or prejudice about the class to which he belongs when seeking fulfillment of employment. His suitability for a particular position, privilege or right must be determined on the appropriate individual basis.

The courts have seen fit to strike down discriminations on the basis of race, sex, poverty, travel, religion and family. This case squarely presents the classification to exclude petitioner based on chronological age yet justified only by an abstract and unsupported claim of statistical inference. The time has come to discard yet another invidious distinction unjustly applied.

II.

THE TRIAL COURT'S PREJUDICE, CONDUCT AND RULINGS WERE SO CLEARLY AND GROSSLY ERRONEOUS AS TO CONSTITUTE A DENIAL OF DUE PROCESS.

Many actions of the Trial Court were clearly reversible error. Some in isolation and all in combination were sufficiently extreme that this Court should take jurisdiction to correct the violations of due process and reaffirm principles of fair trials for all the lower courts. See, e.g., Thompson v. Louisville, 362 U.S. 199 (1960). The Appendix to this petition contains some examples of judicial error, but the whole record must be read to perceive the extremity of the miscarriage of justice. 7/

7/ For one among many examples, the Court addressed petitioner's counsel

cont'd.....

At the first hearing on the case, Judge Harold Tyler dismissed the constitutional issue from the bench and concluded that there was no jurisdiction. Counsel for petitioner pointed out that there was diversity jurisdiction on breach of contract, to which the Judge replied, "I didn't really think you were pressing very seriously the breach of contract

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fn. 7 cont'd on at least eleven occasions by his first name, a condenscension and revelation of attitude not necessary and not employed on other occasions where the Court found it possible to address him with the title 'Mister.' See Hamilton v. Alabama, 376 U.S. 650 (1964). In substance: numerous philosophers were prepared to testify that the correspondence the Court had before it would be understood by all academics and particularly philosopers as unequivocally binding on Fordham to give petitioner the Schweitzer Chair when the funds became available to it. Judge Tyler totally prevented such testimony. Such a ruling is directly against all the relevant law. See, in general, Corbin Contracts, 544, 555. Restatement of Contracts, 246, 248 in

claim." It was the first cause of action and a subject of extended discussion in petitioner's memorandum of law present at that time. When motion for Summary Judgment was denied in the Opinion attached in the appendix, it became quite clear that the trial judge to whom it had initially been assigned for all purposes was convinced petitioner had little or no chance on the merits. His case, as that opinion revealed,

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fn. 7 cont'd.... N.Y., Walls v. Bailey, 49 NY 464 (1872) particularly 469-70; In Re Wampfler's Estate, 123 NY 52735 (1953); Mencher v. Weiss, 306 NY 1, 114 N.E. 2d 177 (1953, particularly 5-6. Udell v. Cohen, 122 NYS 2d 522 (1963); Thompson v. Sloan, 23 Wend. 71 (1840); Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116 (S.D.N.Y. 1960); in general Ermoleiff v. R.K.O., 19 Cal. 543, 122 P2 3 (1942); Hearst v. W. J. Lake Co., 141 Ore. 306, 16 P.2d, 627 (1932); Kregliner and Fernau v. Webb, 162 F. Supp. 695 (E.D. Pa. 1957); in Law Reviews: Custom and Trade Usage, 55 Colum. L. Rev. 1193 (1955) and cases cited. A concommitant error was made in preventing

would rest in part on the credibility of witnesses. Yet, as became clear subsequently, Judge Tyler had already prejudged petitioner's credibility--believing he had changed his memory post-litigationally when petitioner stated unequivocally that he had a binding agreement and detailed all the ways he relied on it, even though a more common sensical point of view would lead to a belief that an

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fn. 7 cont'd.... the draftsman Chairman Robert Neville from testifying as to how he meant the words used and how he explained them. Cf. Pennsylvania Co. v. Wilmington Trust Co., 166 A2 726 (Del. Ch. 1960); and in ruling the State Department of Education could not be asked its involvement by giving money and facilities for use in age discrimination. Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); Hammond v. University of Tampa, 344 F.2d 951 (5th Cir. 1965). In addition, Judge Harold Tyler ruled as a question of law that the offering letter was not an offer for it was contingent on funds being available. Such a ruling is clearly wrong; Corbin on Contracts at 649:

academic would sue for the first time in his life only when he believed he had a contract, relied on it, and had it breached. At this point, a jury demand, or in the alternative, a motion for a jury was before the Court. Yet knowing of his predisposition, the jury demand was denied. Such denial ran counter to the spirit of such cases as Dairy Queen v. Wood, 369 U.S. 469 (1962). Moreover, the amended complaint

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fn. 7 cont'd....

> "In such cases, it is quite incorrect to say that until the event occurs there is no contract; neither party has the privilege of revocation and no further expression of assent by the two parties is necessary. The binding character of such a conditional contract has been recognized by sustaining a bill for specific performance and injunction." Corbin on Contracts at 629: "[A]n

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for which the jury demand was made raised new issue which required a jury trial. Cataldo v. E. I. Dupont, 253 F. Supp. 235 (S.D.N.Y. 1966); Western Geophysical Co. v. Bolt Associates, 440 F.2d 765 (2nd Cir. 1971); Jackson v. Airways Parking, 297 F. Supp. 1366 (1969).

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fn. 7 cont'd....

> agreement [is]...a valid contract...[when] both the exchanged promises are expressly conditional on one and the same event [citations omitted]."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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